



Missouri Court of Appeals
Southern District

Division One

DAVID GLENN LATHAM,)	
)	
Movant-Appellant,)	
)	
v.)	No. SD34306
)	
STATE OF MISSOURI,)	Filed: Feb. 21, 2017
)	
Respondent-Respondent.)	

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable Gayle L. Crane

REVERSED IN PART AND REMANDED WITH DIRECTIONS

David Glenn Latham (“Movant”) appeals the motion court’s denial on the merits of a post-conviction claim raised for the first time in an untimely amended Rule 24.035 motion.¹ Because the time limits imposed by Rule 24.035 are mandatory, we affirm the motion court’s denial of post-conviction relief based upon the unchallenged findings and conclusions related to the claims raised in Movant’s original *pro se* motion, but we remand the matter and direct the motion court to enter an order dismissing Movant’s

¹ All rule references are to Missouri Court Rules (2016). Unless otherwise noted, all statutory references are to RSMo Cum. Supp. 2001.

time-barred amended motion and enter amended findings and conclusions that omit any reference to the untimely claim.

Procedural History

Movant pleaded guilty to the class-A felony of second-degree drug trafficking, *see* section 195.223, for possessing “6 grams or more of a mixture or substance containing a cocaine base, a controlled substance, knowing of its presence and nature.” After initially suspending the execution of a fifteen-year sentence, the plea court later executed that sentence after finding that Movant had violated the terms of his probation. Movant was delivered to the Department of Corrections to begin serving his sentence on August 12, 2013.

On November 20, 2013, Movant timely filed a *pro se* Rule 24.035 motion to vacate, set aside, or correct the judgment and sentence (“the first motion”). *See* Rule 24.035(b).² The motion court appointed the public defender’s office to represent Movant on December 11, 2013. The transcript of Movant’s guilty plea was filed on March 25, 2014, and Movant had sixty days from that date to file any amended Rule 24.035 motion. *See* Rule 24.035(g). On June 20, 2014, after the sixty-day deadline for filing an amended motion had passed, post-conviction counsel filed a statement “of his intention to not file an amended motion for post[-]conviction relief pursuant to Rule 24.035(e) [“statement in lieu”.]” The statement in lieu averred that after having reviewed the pertinent documentation and interviewing Movant by telephone, post-conviction counsel had determined that there was “no additional legal or factual basis to amend [the] claims” set

² The first motion was timely filed within 180 days after his arrival at the Department of Corrections.

forth in the first motion.³ On June 23, 2014, three days after the filing date of the statement in lieu, Movant filed a *pro se* amended Rule 24.035 motion (“the second motion”).⁴

The motion court held an evidentiary hearing on all of Movant’s claims and subsequently entered a judgment denying “all relief sought[.]”

In this appeal, Movant attempts to challenge the motion court’s denial of post-conviction relief based solely on an allegation contained only in the second motion. That claim is that Movant’s plea counsel “was ineffective for allowing [Movant] to plead guilty to the criminal offense of trafficking” because the State’s evidence did not provide a factual basis for the charged offense. Specifically, Movant refers to a laboratory report he says proves that Movant possessed not “cocaine base[.]” as charged in the felony information, but rather cocaine *salt*. We cannot reach the merits of that claim because the motion containing it was not timely filed and should have been dismissed for that reason by the motion court.

Timeliness of the Second Motion

As relevant here, an amended motion seeking post-conviction relief “*shall* be filed within sixty days of the earlier of . . . the date both a complete transcript consisting of the guilty plea and sentencing hearing has been filed in the trial court and counsel is appointed[.]” Rule 24.035(g) (emphasis added). Both prerequisites were met on March

³ Rule 24.035(e) provides, in pertinent part:

If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the *pro se* motion and (2) all claims known to the movant are alleged in the *pro se* motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

⁴ Movant does not claim that the second motion is a Rule 24.035(3) reply to his post-conviction counsel's statement in lieu.

25, 2014. Rule 24.035(g) also provides that “[t]he court *may* extend the time for filing the amended motion for one additional period not to exceed thirty days.” (Emphasis added). However, Movant admits in his brief that no such extension was granted.⁵ The second motion was therefore due no later than May 27, 2014,⁶ and it was not filed until June 23, 2014 – several weeks after the deadline had passed. Therefore, the amended *pro se* motion was untimely. See **Johnson v. State**, 210 S.W.3d 427, 432 (Mo. App. S.D. 2006) (an amended *pro se* motion must be timely filed so as to vest the motion court with jurisdiction to adjudicate the additional claims); **Oliver v. State**, 196 S.W.3d 643, 645 (Mo. App. S.D. 2006) (same holding); **Rutherford v. State**, 192 S.W.3d 746, 748-49 (Mo. App. S.D. 2006) (same holding).

Movant contends in the argument portion of his brief that the second motion “should be treated as timely” notwithstanding the explicit time limits of Rule 24.035(g) based on the following rationale: post-conviction counsel filed a statement in lieu of an amended motion pursuant to Rule 24.035(e); Rule 24.035(e) allows a movant to file a “reply” to a statement in lieu “not later than ten days after the statement is filed”; therefore, because post-conviction counsel filed a statement on June 20, 2014, and Movant filed the second motion on June 23, 2014 (within ten days of the filing of the statement in lieu), the second motion was timely. We disagree.

⁵ Even if Movant had made no such admission, we cannot presume that an extension was granted. “Although ‘motions for extensions of time are routinely and almost always automatically granted if requested,’ . . . extensions will not be presumed to have been granted without a record thereof.” **Frazer v. State**, 480 S.W.3d 442, 445 (Mo. App. W.D. 2016) (quoting **Childers v. State**, 462 S.W.3d 825, 828 (Mo. App. E.D. 2015)).

⁶ The 60th day after March 25, 2014 was May 24, 2014, and it fell on a Saturday. The following Monday, May 26, 2014, was Memorial Day, a state holiday. See Rule 20.01(a) (“In computing any period of time prescribed or allowed by these Rules . . . [t]he last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day”).

The problem with Movant’s argument is that it conflicts with the language of Rule 24.035(g). The time limits governing post-conviction relief motions are mandatory. *Stanley v. State*, 420 S.W.3d 532, 540 (Mo. banc 2014). As to amended motions, our high court has observed that “[a]rguments raised for the first time in a second amended motion filed after the time limit set out in Rule 24.035(g) are barred from consideration.” *Id.* Movant cites no authority for the proposition that the provisions in Rule 24.035(e) act to enlarge the *mandatory* time limits for the filing of amended motions set forth in Rule 24.035(g), and we can find no such authority. Accordingly, we hold that the second motion was not timely filed.

An untimely amended motion may be considered on its merits only if one of the following three rare exceptions applies:

- (1) when the motion was delivered to the court so it would be filed within the time limits of the Rules but the court lost or misfiled the motion;
- (2) when post-conviction counsel abandoned the movant, i.e.,] improperly acted or failed to act to the movant’s detriment; and
- (3) in very rare circumstances where an improper filing, caused by circumstances beyond the control of the movant, justified a late receipt of the motion by the proper court.

Wiley v. State, 368 S.W.3d 236, 238 (Mo. App. E.D. 2012) (internal quotes and brackets omitted). As to these exceptions and any applicability they might have to the facts of this case, Movant argues only that he “would have no objection to this Court holding that a late filing of a statement in lieu [of an amended motion] creates a presumption of abandonment, necessitating a remand of the case for an abandonment hearing.” We decline the invitation. Unlike Rule 24.035(g), Rule 24.035(e) provides no deadline for filing a statement in lieu of an amended motion. As such, a statement in lieu of an amended motion is not “a late filing[,]” nor does it “[create] a presumption of

abandonment” merely because it was filed after the time limit applicable to an amended motion. Cf. *Mason v. State*, 488 S.W.3d 135, 141 (Mo. App. S.D. 2016); *Pennell v. State*, 467 S.W.3d 367, 373-74 (Mo. App. E.D. 2015). The *Mason* and *Pennell* courts held that a statement in lieu of an amended Rule 29.15 motion is not subject to the sixty-day time limit of Rule 29.15(g) and does not create a presumption of abandonment if filed after this time limit. *Mason*, 488 S.W.3d at 141; *Pennell*, 467 S.W.3d at 373-74. Rule 29.15(g) contains substantive provisions that are identical to the provisions of Rule 24.035(g). “[C]ase law interpreting a provision that is identical in both rules applies equally in proceedings under either rule.” *Vogl v. State*, 437 S.W.3d 218, 224 n.7 (Mo. banc 2014). As observed in *Pennell*, a presumption of abandonment may arise under different facts and circumstances, such as “(1) when the statement itself was defective by not demonstrating on its face that appointed post-conviction counsel conducted a thorough review of the initial motion; or (2) when the statement was filed in a manner that prevents the finality of criminal convictions without undue delay.” 467 S.W.3d at 374. Movant makes no claim that either of these circumstances was present here.

A motion court “is compelled to dismiss late-filed motions.” *Stanley*, 420 S.W.3d at 540. Therefore, the motion court clearly erred by denying Movant’s second motion on the merits instead of dismissing it. See *Greenleaf v. State*, 501 S.W.3d 911, 913 (Mo. App. E.D. 2016) (“Where the circuit court improperly considers the merits of claims that are time-barred by Rule 24.035, the proper disposition on appeal is to vacate the judgment and remand with instructions to dismiss”) (quoting *State v. Johnson*, 422 S.W.3d 430, 433 (Mo. App. W.D. 2013)).

The unchallenged findings and conclusions related to the first motion are affirmed. The cause is remanded for the entry of an order dismissing the second motion as untimely and the entry of amended findings and conclusions that omit any reference to the claims raised in the second motion.

DON E. BURRELL, J. – OPINION AUTHOR

JEFFREY W. BATES, P.J. – CONCURS

MARY W. SHEFFIELD, C.J. – CONCURS